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No. 96-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The United States' Brief essentially concedes that the grounds on which petitioner seeks certiorari are uncontested. It is undisputed that the district court failed to instruct the jury on an essential element of the offenses with which petitioner was charged and convicted. It also is uncontested that the jury made no factual findings with respect to this omitted element. And it is likewise agreed that "[t]here is apparent disagreement among the courts of appeals on the availability of harmless-error review when an instructional error removes an element of an offense from a jury's consideration." U.S. Br. 5. Finally, the United States makes no attempt to diminish the exceptional importance of this constitutional question, or the need for Supreme Court review thereof.

citing Justice Scalia's concurring opinion in *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), the United States maintains that certiorari may not be appropriate given the Eleventh Circuit's holding that the instructional error was harmless because petitioner supposedly "admitted" the element omitted from the trial court's instructions. And second, the United States suggests that the Court may wish to hold the Petition pending its ruling in *United States* v. *Johnson*, No. 95-6556 (argued February 25, 1997). As we demonstrate below, neither of these concerns is well-founded, and neither cast any doubt on the fact that this case provides the Court with an ideal opportunity to resolve the important and unanswered constitutional question presented in the Petition.

1. In suggesting that the Eleventh Circuit's decision is not worthy of review, the United States' Brief conflates the two entirely separate questions that arise when harmless error is urged as basis for affirmance on appeal. As this Court explained in *Chapman v. California*, 386 U.S. 18 (1967), whenever a claim of harmless error is made, the court must address two distinct questions: "(1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" *Id.* at 20. Of course, if the appellate court answers the first question in the negative, there is no need to answer the second, for if the error is one that cannot be harmless under the Constitution, it makes no difference whether the error was actually harmless. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

The question presented by petitioner relates solely to the *first* of the harmless error questions posed in *Chapman, i.e.*, can the erroneous removal of an essential element of the charged offense from a jury's consideration "be held to be harmless"? In this case, the Eleventh Circuit unequivocally answered that question in the affirmative, holding that such an error is not "a 'structural defect[] in the constitution of the trial

mechanism, which def[ies] analysis by 'harmless error' standards,'" since "the jury will have made a constitutionally valid determination of guilt on all issues save one." Pet. App. 12a & n.12. In so doing, the court readily acknowledged that its holding on this constitutional question was in direct conflict with those of other circuits, and that Supreme Court review of the question was necessary. *Id.* at 10a-12a, n.11. See also *id.* at 11-16 (discussing split in the circuits and state courts of last resorts)

Having answered the first *Chapman* question in the affirmative, the Eleventh Circuit proceeded to address the second question, holding that the error below was harmless since "the instructional omission related to an element of the crime that the defendant in any event admitted." Pet. App. 17a. In doing so, the court of appeals relied heavily upon Justice Scalia's concurrence in *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam). Yet, contrary to the suggestion in the United States' Brief, the Eleventh Circuit's answer to this secondary question has no bearing at all on the question presented in the petition, which relates solely to the threshold issue of whether the instructional error in this case is one that constitutionally can *ever* be held to be harmless.

The Eleventh Circuit's opinion makes clear that it regarded the question of whether petitioner "admitted" the essential element omitted from the trial court's instructions to relate solely to the question of whether the error was harmless — not to whether harmless error review is constitutionally appropriate in the first instance. The court of appeals only relied on Justice Scalia's concurrence in *Carella* to judge "the effect of instructional omissions" on the proceedings below and to determine whether the error could "be viewed as harmless." Pet App. 14a. Indeed, Justice Scalia's concurrence in *Carella* — which concerned the use of conclusive presumptions on an element presented to the jury — should not be read as

suggesting that harmless error analysis is constitutionally appropriate whenever a defendant admits (or is alleged to have admitted) an essential element that wrongly has been omitted from the trial court's instructions. Nor is there any support for such a proposition in this Court's decisions. As this Court unanimously held in *Estelle v. McGuire*, 502 U.S. 62, 69 (1991), "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." Most recently, Justice Scalia himself joined in the dissenting opinion of Justice O'Connor in *Old Chief v. United States*, 117 S. Ct. 644 (1997), which again reiterated that "[a]t trial, a defendant may thus choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element." *Id.* at 659 (dissenting opinion). Even the United States advocated this point in *Old Chief*. See Brief for the United States, *Old Chief v. United States* (No. 95-6556), at 22.

In short, as the court of appeals' decision itself reflects, the question of whether petitioner admitted the omitted essential element (a point he strongly contests) has no bearing at all on the question presented in the Petition or the propriety of review by this Court.

The United States nonetheless argues that because it believes the court of appeals was correct in finding the instructional error to be harmless, the question of whether harmless error review can be applied "is not properly presented here." U.S. Br. at 6. In fact, the government's argument stands *Chapman* harmlss error analysis on its head. As this Court made clear in *Chapman*, 386 U.S. at 20, if the error in question is one that cannot constitutionally be harmless, it is irrelevant whether the error was actually harmless or not. Accordingly, whether the court of appeals correctly found the

error below to be harmless has no bearing at all on the threshold question, presented here, of whether such errors are even amenable to harmless error review. In fact, even if one assumes, *arguendo*, that the instructional error below was harmless, this would only serve to *confirm* that the question presented is ideally framed for Supreme Court review here, since its resolution would be wholly dispositive in this case.

2. The United States also suggests that this Court may wish to hold the petition pending its decision in *Johnson v. United States*, No. 96-203 (argued Feb. 25, 1997). There is no reason at all for the Court to hold the petition, as this case bears little resemblance to *Johnson*. As the Government acknowledges, the petitioner in *Johnson* failed to object at trial to having the element of materiality decided by the court rather than the jury. Accordingly, the questions presented in *Johnson* necessarily will turn upon an application of Fed. R. Crim. P. 52. In sharp contrast, the question presented here is entirely of constitutional dimension, since petitioner made a timely objection to the instructional error. Indeed, the United States' Brief provides no explanation at all as to how any ruling in *Johnson* could resolve the constitutional question presented, or dictate the outcome, in this case. In *United States v. Olano*, 507 U.S. 725, 731 (1993), this Court held that "a constitutional right * * * may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Since no timely objection was asserted in *Johnson*, and since *Johnson* thus involves an application of the plain error doctrine — not the harmless error doctrine at issue here — there is little prospect that the Court will resolve in *Johnson* the constitutional question presented here. In short, there is no reason for this Court to hold the petition in this case pending its ruling in *Johnson*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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